Supreme Court, U.S.
FILED
FEB 4 2000
CLERK

(4)

No. 99-935

In The

Supreme Court of the United States

MICHAEL CHANDLER, individually and as father and next friend of JESSE CHANDLER,

Petitioners,

vs.

FORREST H. "FOB" JAMES, JR., in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

PAMELA L. SUMNERS*
LAW OFFICES OF PAMELA L. SUMNERS
P.O. Box 370862
Birmingham, AL 35237-0862
(205)320-0200
*COUNSEL OF RECORD

ELIZABETH J. HUBERTZ
P.O. Box 370862
Birmingham, AL 35237
(205)567-9326

additional counsel on inside cover

14/pp

STEVEN K. GREEN
AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

STEPHEN L. PEVAR
ACLU FOUNDATION
1888 Sherman Avenue
Suite 380
Denver, CO 80203
(303) 839-5752

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
ARGUMENT 1
I. THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER "PERMITTING" STUDENTS AND NONSCHOOL PERSONNEL TO ENGAGE IN GROUP PRAYER BEFORE A CAPTIVE STUDENT AUDIENCE VIOLATES THE ESTABLISHMENT CLAUSE 1
II. RESPONDENTS' ARGUMENTS FOR DENYING THE WRIT ARE RED HERRINGS 3
III. THE ELEVENTH CIRCUIT IS AT ODDS WITH ITS SISTER CIRCUITS 6
IV. THE PENDENCY OF *SANTA FE v. DOE* DOES NOT COUNSEL DENYING THE WRIT 7
CONCLUSION 9

TABLE OF AUTHORITIES

Cases	Pages
ACLU v. Black Horse Pike Reg. Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (*en banc*)	6
Adler v. Duval County Sch. Bd., 174 F.3d 1236 (11th Cir. 1999)	7
Berger v. Renssalaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993)	6
Collins v. Chandler Unified Sch. Dist., 644 F.2d 759 (9th Cir. 1981)	6
Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979)	4
Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3321 (U.S. Nov. 15, 1999) (No. 99-62)	7, 8
Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir.), *cert. denied sub nom., Moore v. Ingebretsen*, 519 U.S. 965 (1996)	6
Lamb's Chapel v. Center Moriches Union Sch. Dist., 508 U.S. 384 (1993)	3
Lee v. Weisman, 505 U.S. 577 (1992)	5
Lewis v. Casey, 518 U.S. 343 (1996)	4
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	5
Rosenberger v. Board of Rectors, 515 U.S. 819 (1995)	3
Wallace v. Jaffree, 459 U.S. 1314 (1983)	4
Widmar v. Vincent, 454 U.S. 263 (1981)	3

ARGUMENT

Respondents fail to respond to the central issues on which Petitioners seek certiorari: whether "permitting" students and nonschool personnel to lead students in prayer and other religious activities in classrooms, at school assemblies, and at other school-sponsored events involving captive audiences constitutes endorsement and coercion of religious activity in violation of the Establishment Clause, and whether refusing to permit such activities in school-sponsored settings results in "viewpoint discrimination." Rather, Respondents obfuscate the distinction between school-sponsored and private prayer and theorize that permitting prayer via the machinery of the state is mere neutrality toward religious speech. These errors mirror those of the Eleventh Circuit's decision.

I. THIS CASE SQUARELY PRESENTS THE QUESTION OF WHETHER "PERMITTING" STUDENTS AND NONSCHOOL PERSONNEL TO ENGAGE IN GROUP PRAYER BEFORE A CAPTIVE STUDENT AUDIENCE VIOLATES THE ESTABLISHMENT CLAUSE

Respondents claim that this case is not about "group prayer before a captive audience of K-12 students," but is instead about private prayer and neutrality toward private prayer. (*See* Resp. Br. at 6-7.) As Respondents are aware, however, Petitioners have never challenged purely private religious activity, such as students saying grace at lunch (*see, e.g.*, App. E25 (testimony to this effect)), and the injunction

forbids only "school-sponsored" or "officially sanctioned" – not private -- prayer. (*See* App. D4-5, D9.)

The Eleventh Circuit misdefined "private" prayer, emphasizing the identity of the speaker rather than the context in which the speech occurs. The court held that school officials must permit "students, or other private parties"[1] to engage in religious speech before an audience of students, over the intercom, to the same extent -- and with only the same time, place, and manner restrictions -- as they are permitted to engage in secular speech. (*See* App. A22.) This holding undeniably extends to corporate prayer before captive audiences. The Eleventh Circuit itself recognized this, in suggesting that dissenting captive schoolchildren can simply "not listen" and "not participate," while enduring "social isolation or even anger" – since that is "the price the Constitution extracts for our own liberty." (App. A20-21.) The decision applies "in school" and "at school-related events," without limitation. (App. A22. S*ee also* App. A6, A8, A11, A13, A21.)

The Eleventh Circuit justifies this sweeping holding on

---

[1] Respondents dispute that public forum analysis is implicated in the Eleventh Circuit's decision. (Res. Br. at 13.) They are at a loss, therefore, to explain how persons other than students have the rights in the school setting that the Eleventh Circuit conferred. They insist instead that the decision does not plainly draw a distinction between school employees on one hand, and students and nonschool personnel, on the other. (*Compare* A6 n. 6 *with* A5, A22 *and* Res. Br. at 13.)

the theory of "neutrality." However, an understanding of neutrality that commands schools to permit students and *nonschool personnel* to engage in religious speech, not only "in school" but in school-sponsored events as well, is anomalous. (*See* Pet. Br. at 10-22.) Contrary to Respondents' argument, not one of this Court's precedents sanctions explicitly religious speech at school-sponsored events before captive schoolchildren under the banner of "neutrality."

Rather, this Court has assayed that viewpoint neutrality "permits" explicitly religious speech *only* in those situations involving fora that have been made available to a wide array of viewpoints, and *only* in a context of noncaptive audiences. *See Rosenberger v. Board of Rectors,* 515 U.S. 819, 831, 842 (1995) (university that funds "wide spectrum" of over 100 student newspapers covering student news, information and opinion must fund Christian newspaper that covers same subject matter); *Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. 384, 395 (1993) (school that has made buildings available after hours to "a wide variety of private organizations" must make facilities available to religious organizations to speak on these same subjects); *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) (university that has made facilities available to "broad class" of over 100 recognized student groups must allow access to religious groups as well).

The Eleventh Circuit's extension of this "neutrality" standard to classrooms, assemblies, and other school-sponsored events where captive audiences are present is inconsistent with

this Court's precedents and should be corrected.

II. RESPONDENTS' ARGUMENTS FOR DENYING THE WRIT ARE RED HERRINGS.

Unable to meet the Petitioners' substantive arguments, Respondents offer arguments about jurisdictional and prudential matters that are belied by the facts and rebuffed by the law.

First, Respondents labor to create the misimpression that the Court would wade into a factual morass if it grants the petition. (*See* Resp. Br. at 4-10.) This is untrue. Respondents did not contest any of the facts on appeal; they are established. (*See* DeKalb's Brief on Appeal at 4 (waiving the facts).) The sole, ripe question is whether the Eleventh Circuit applied the correct *law* governing religious speech by students and nonschool persons in school-sponsored settings with captive student audiences.

Second, Respondents argue that the Chandlers lack standing. (*See* Resp. Br. at 8 and 8 n.4.) These arguments were briefed and rejected without comment by the Eleventh Circuit.[2]

Respondents make the novel argument that since Jesse Chandler is now an eleventh grader, he cannot challenge establishments of religion in grades K-10. This reasoning is undone by the fact that DeKalb County's eight schools enroll

---

[2] The parties' positions have not changed since the opinion issued.

grades K-12 on one campus. The school-sponsored events at issue are not necessarily limited to one grade or, in some cases, to one school. Events such as graduations, the trial court found, are communitywide events attended by students of all ages from various schools. (App. E40.) Establishment Clause violations are not confined by grade levels, contrary to Respondents' conjecture.[3]

Respondents also suggest, creatively, that *evidence* of particular constitutional violations can be extracted from categories of enjoined conduct as though each piece of evidence stands alone. They Balkanize standing: Jesse is no longer in fifth grade and will not therefore attend a 4-H Club assembly with broadcast prayer, Jesse no longer is in Ms. Carroll's homeroom and therefore will not be subjected to her prayers. This is not the point.

The trial court found "pervasive and recurrent" school-sponsored religious activities. (App. E11.) Jesse may never again attend a fifth-grade D.A.R.E. or 4-H assembly where there is prayer over the state's microphone. But he will, and while this suit was pending did, attend assemblies and school-related events featuring prayer. (App. E19-20.) Jesse may

---

[3] Respondents also contend that Jesse may obtain a remedy only against his school, Fyffe. The authorities say otherwise. *See Lewis v. Casey*, 518 U.S. 343, 359-60 (1996); *Wallace v. Jaffree*, 459 U.S. 1314 (1983); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465-66 (1979). Respondents' theory, while novel, is unpersuasive.

never encounter Ms. Carroll again, but he will encounter classrooms until he graduates, and there is evidence of recurrent classroom prayer, including at Fyffe, by a teacher other than Ms. Carroll. (*See* R13-316; App. E22-23.) He will attend graduations, both his own and others', and he will attend football games, as he did pre-suit.

Jesse has personally experienced every category of "pervasive and recurrent" conduct the injunction proscribes. (App. E11-62.).[4] This is all he must show for standing.[5]

---

[4] Respondents assert that, although Gideon distributions occur in twelfth-grade classrooms, Jesse will not encounter them again because the school board has adopted a "no-distribution" policy for materials that are not distributed by students. (Resp. Br. at 8 n.4.) They overlook that the policy was adopted under court order. (*See* D10 (ordering policy).) Nor does DeKalb have an even record of applying the policy. In 1999, DeKalb allowed Sav-a-Life to distribute materials and allowed distribution of a "Football for Christ" solicitation, in violation of the policy. (R13-316; R13-317.)

[5] Respondents' contentions with regard to Michael Chandler are meritless. He has not retired as Jesse Chandler's father, and he alleged injury to his parental rights. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Since Jesse experienced the pervasive conduct that was enjoined, however, Respondents' remarks on Mr. Chandler's standing or mootness are irrelevant. *See also Lee v. Weisman*, 505 U.S. 577 (1992) (where child and parent have alleged injury to protected rights, addressing taxpayer standing is irrelevant).

III. THE ELEVENTH CIRCUIT IS AT ODDS WITH ITS SISTER CIRCUITS

As Petitioners observed, the Fifth, Third, Ninth, Second, and Seventh Circuits have parted ways with the Eleventh. (Pet. Br. at 24-30.)

Respondents imply that the cases cited by Petitioners were decided as they were because prayer, and no other speech, was involved in the captive-audience settings featured in these cases. On the facts of our case, this is a distinction without a difference, for there was no secular counterpart to prayer. (*See* Pet. Br. at 2-6.)

For example, Respondents distinguish *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied sub nom., Moore v. Ingebretsen*, 519 U.S. 965 (1996) on the ground that Mississippi's statute permitted *only* prayer. So did Alabama's, and *Chandler* in fact involved *applications* of a statute mandating that the schools "shall permit" prayer at school-sponsored events. They distinguish *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981) on the ground that the policy permitted only prayers. So did DeKalb's policy and statutory applications, as is clear from the undisputed facts. (*See* Pet. Br. at 2-9.) They distinguish *Berger v. Renssalaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993) on the ground that the schools vested total discretion in principals to allow Gideon Bible distributions. So did Respondents, which is why the trial court ordered DeKalb to adopt a uniform policy. (App. E54.) They distinguish *ACLU*

v. Black Horse Pike Reg. Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (*en banc*) on the ground that students could vote *only* on whether they wanted explicitly prayer at graduation. This is unavailing; DeKalb's policy was to unilaterally insert prayers. Respondents' distinction of these cases is thus unpersuasive even with their interpretive gloss.

Furthermore, it is pretense to suggest that these cases were decided on the basis that prayer was the only speech permitted at school-sponsored events. This is not the principle for which the cases of these other circuits stand. Respondents cannot distinguish these cases, all contrary to *Chandler*, for the simple reason that each rejects Respondents' intimation that if schools endorse other speech, they are freed from the constraints of the Establishment Clause to endorse prayer. In truth, the cases from other circuits that Respondents purport to distinguish explicitly reject Respondents' and the Eleventh Circuit's position. In stark contrast to the Eleventh Circuit, other circuits have held that "permitting" the school's events and facilities to be used for prayer and devotional activity works an endorsement of religion. (*See* Pet. Br. at 26-28.) This is the exact opposite of the Eleventh Circuit's holding.

IV. THE PENDENCY OF *SANTA FE v. DOE* DOES NOT COUNSEL DENYING THE WRIT

Respondents urge that the pendency of *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3321 (U.S. Nov. 15, 1999) (No. 99-62) counsels

denying the writ.[6] It does not. In *Santa Fe*, the school board policy allows students (and only students) designated time to speak on their chosen topic. The Eleventh Circuit decision, by contrast, allows *nonschool personnel* to pray in school and at school-sponsored events. This exceeds entirely the "student-initiated prayer" issue that Respondents, ignoring the presence of clergy and evangelists in this case, contend is at issue here. (*Compare* Resp. Br. at 14 *with* App. E.)

Respondents' suggestion that this case bounce up and down among the lower courts because *Santa Fe* is being heard is illogical. (Resp. Br. at 11-12.) This case presents issues not present in *Santa Fe* that merit review here. If the Court feels otherwise, however, Petitioners urge the Court, in accordance with its practice, to provisionally grant the writ and hold this case pending its decision in *Santa Fe*. This would obviate the risk of multiple and inconsistent decisions in lower courts, on at least the common issue of nonschool-day pregame prayer that will be resolved in *Santa Fe*.

---

[6] They also insist that the writ should be denied because the Eleventh Circuit is hearing *Adler v. Duval County* en banc. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999). *Adler* has no effect here; indeed, *Adler* will be wholly governed by the decision in *Santa Fe*, since both involve only noninstructional settings – not classrooms and schoolday activities. Moreover, *Adler*, like *Santa Fe*, cannot resolve the issue of the rights of nonschool personnel to pray in schools, since the policy in that case is limited to students.

CONCLUSION

This Court should grant the writ. Alternatively, at a minimum, it should provisionally grant the writ and hold the case pending disposition of *Santa Fe.*

Respectfully submitted,

PAMELA L. SUMNERS*
LAW OFFICES OF PAMELA L. SUMNERS
P.O. Box 370862
Birmingham, AL 35237-0862
(205)320-0200
*COUNSEL OF RECORD

ELIZABETH J. HUBERTZ
P.O. Box 370862
Birmingham, AL 35237
(205)567-9326

STEVEN K. GREEN
AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

STEPHEN L. PEVAR
ACLU FOUNDATION
1888 Sherman Avenue
Suite 380
Denver, CO 80203
(303) 839-5752